Filed 3/26/19 Kensington Caterers v. Iwuchuku

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KENSINGTON CATERERS, INC. et al., Cross-complainants and Respondents, v. DONALD IWUCHUKU, et al. Cross-defendants and Appellants.	B285944 (Los Angeles County Super. Ct. No. BC507797)

APPEAL from an order of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Affirmed.

Odiase Law Group and Charles Odiase for Cross-defendants and Appellants.

Cruz & Del Valle, Leonard G. Cruz and Sonia H. Del Valle for Cross-complainants and Respondents.

Cross-defendants and appellants Donald Iwuchuku (Iwuchuku) and Metu Ogike (Ogike) (collectively, the Attorney Cross-defendants) appeal an order denying their special motion to strike a cross-complaint filed by cross-complainants and respondents Kensington Caterers, Inc. (Kensington) and Richard Mooney (Mooney). (Code Civ. Proc., § 425.16.)[1]

We conclude the trial court properly determined that the cross-complaint did not arise out of protected activity by the Attorney Cross-defendants, and therefore affirm the order denying their special motion to strike.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Earlier proceedings*.

On May 3, 2013, plaintiffs Rosa Rosas (Rosas) and Julio Casas (Casas) filed suit against Kensington and Mooney alleging, inter alia, wrongful termination in violation of public policy, as well as statutory claims under the Labor Code and under the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.). In September 2013, Rosas and Casas obtained entry of default as to both Kensington and Mooney. On March 19, 2015, the matter proceeded to a default prove-up hearing, and the trial court entered separate default judgments in favor of Casas and Rosas, against both Kensington and Mooney, awarding each plaintiff the sum of $250,585.

On March 26, 2015, Rosas and Casas assigned their judgments for purposes of collection to Willie McMullen d.b.a. Strategic Collections (McMullen), who obtained writs of execution. On July 22, 2015, McMullen levied on $293,896 in accounts belonging to Kensington and Mooney. On October 7,

---

[1] All unspecified statutory references are to the Code of Civil Procedure.

2015, McMullen assigned and transferred all rights, title and interest in the judgments back to Rosas and Casas.

On September 4, 2015, within six months of entry of the default judgments, Kensington and Mooney filed a motion under section 473 to set aside the entries of default, default judgments, and writs of execution. They contended, inter alia, the default judgments were procured by a false affidavit of service, due process was violated because the judgments exceeded the amount demanded in the complaint, and the judgments were excessive.

The matter was heard on November 24, 2015, and the trial court orally ruled it would grant the motion in its entirety. On December 18, 2015, the trial court entered a formal order vacating the entries of default and the default judgments, cancelling the abstract of judgment, recalling the writs of execution, and deeming Kensington's and Mooney's answer served as of November 24, 2015, the date of the hearing on the motion. Rosas and Casas did not appeal the December 18, 2015 order.

On December 3, 2015, Rosas and Casas filed a motion for reconsideration of the November 24, 2015 ruling. (§ 1008, subd. (a).) That motion was denied on February 9, 2016. On March 4, 2016, Rosas and Casas filed a notice of appeal that specified the appeal was from the February 9, 2016 order denying reconsideration.

As for Kensington and Mooney, on February 4, 2016, they moved for an order compelling Rosas and Casas, attorneys Iwuchuku and Ogike, and McMullen to return property seized by Rosas and Casas or on their behalf pursuant to void default judgments. Kensington and Mooney asserted that the failure of Rosas and Casas, their counsel, and their assignee, to return the

funds they had wrongfully seized constituted the tort of conversion, as alleged in a proposed cross-complaint that they sought to file.

On March 2, 2016, the trial court heard the matter and granted the motion by Kensington and Mooney for return of the funds. It directed Rosas and Casas, their counsel, and McMullen to return all funds seized in execution of the vacated judgments within 20 days. The trial court deferred ruling on a request by Kensington and Mooney for leave to file a cross-complaint for conversion. On March 16, 2016, Rosas and Casas filed a notice of appeal from the March 2, 2016 order.

2. *The decision on the prior appeal.*

In a nonpublished opinion (*Rosas v. Kensington Caterers, Inc.* (Apr. 14, 2017, B270721) [nonpub. opn.] (*Rosas I*)), this court held that because the notice of appeal specified the nonappealable February 9, 2016 order denying reconsideration, rather than the December 18, 2015 order vacating the entry of defaults and default judgments, Rosas and Casas had failed to perfect an appeal from the order granting Kensington's and Mooney's motion to vacate.

As for the appeal by Rosas and Casas from the March 2, 2016 order directing their counsel to return the seized funds to Kensington and Mooney, this court determined that Rosas and Casas lacked standing to assert error on their attorneys' behalf, requiring dismissal of the appeal from the March 2, 2016 order that had been entered against Iwuchuku and Ogike.

3. *Proceedings in the trial court relating to the cross-complaint against Iwuchuku and Ogike; denial of their special motion to strike*.

On April 12, 2016, during the pendency of the appeal in *Rosas I*, the trial court granted Kensington's and Mooney's request for leave to file a cross-complaint arising out of counsel's failure to return the seized funds, and the cross-complaint was deemed filed as of that date. The cross-complaint, which was directed against Iwuchuku and Ogike, as well as Rosas, Casas and McMullen, alleged the following causes of action: (1) conversion; and (2) a common count for money had and received/unjust enrichment, based on the cross-defendants' failure to return $259,209 of the seized funds after the default judgments were vacated. The cross-complaint alleged that Iwuchuku and Ogike, as well as the other cross-defendants, had continued to withhold Kensington's and Mooney's funds without legal authority or justification.

On May 26, 2016, Iwuchuku and Ogike filed a special motion to strike the cross-complaint, contending the cross-complaint against them arose from their representation of Rosas and Casas, and that Kensington and Mooney could not establish a probability of prevailing on the merits because Rosas and Casas assigned their rights to an independent collection agency, and further, the cross-complaint was barred by the litigation privilege.

On August 19, 2016, in ruling on a motion by Kensington and Mooney for an order lifting a stay of discovery, the trial court stated that all proceedings were stayed due to the pending appeal by Rosas and Casas, *Rosas I*. The trial court added: "In the unlikely event that Defendants' cross-action is not entirely

stayed, the Court finds that 'good cause' has not been shown for preliminary discovery to oppose the pending anti-SLAPP motion. This is not due to any failing on the part of [cross-complainants]. To the contrary, it is already apparent to the Court that [cross-complainants] will not be required to demonstrate a 'reasonable probability' of prevailing in their cross-action at all." The trial court reasoned, "To be sure, Iwuchuku and Ogike were engaging in petitioning activity when they commenced and prosecuted this action on behalf of Plaintiffs. *However, they are not the subject of a cross-action for conversion and restitution merely for their representation of Plaintiffs. Rather, they have disregarded and resisted an order of the court directing their client's disgorgement of funds seized pursuant to an erroneous judgment*." (Italics added.) The trial court then continued the matter.

On September 2, 2016, Kensington and Mooney filed opposition to the anti-SLAPP motion, contending their cross-complaint seeking restitution did not arise out of Iwuchuku and Ogike's petitioning activity on behalf of Rosas and Casas.

In their reply papers on the anti-SLAPP motion, Iwuchuku and Ogike contended that Kensington and Mooney had failed to meet their burden to show a probability of prevailing on their claims.

On September 19, 2016, the special motion to strike came on for hearing and was ordered off calendar, on the ground the trial court lacked jurisdiction to decide the anti-SLAPP motion during the pendency of the appeal.

On April 14, 2017, this court issued its opinion in *Rosas I*, and the remittitur issued on June 14, 2017.

On September 22, 2017, the anti-SLAPP motion came on for hearing and was taken under submission. On September 27,

2017, the trial court entered an order denying the anti-SLAPP motion. The trial court reiterated its tentative ruling from August 19, 2016 that the cross-complaint did not arise from protected activity by Iwuchuku and Ogike because " 'wrongful disbursement or retention of assets seized pursuant to a void judgment does not constitute protected activity.' " The trial court further found that because Iwuchuku and Ogike had not met their burden on the first prong of the anti-SLAPP analysis, Kensington and Mooney were not required to show a reasonable probability of prevailing on the merits.

On October 24, 2017, Iwuchuku and Ogike filed a timely notice of appeal from the September 27, 2017 order denying their special motion to strike.[2]

CONTENTIONS

The Attorney Cross-defendants contend: (1) the trial court lacked subject matter jurisdiction while the prior appeal was pending, and therefore the trial court had no authority to grant leave to Kensington and Mooney to file the cross-complaint; and (2) the trial court erred in denying the special motion to strike because the Attorney Cross-defendants met their burden on prong one of demonstrating that the cross-complaint arose from their protected activity, and Kensington and Mooney failed to meet their burden on prong two to establish a probability of success.

---

[2] The order denying the special motion to strike is appealable pursuant to section 425.16, subdivision (*i*) and section 904.1, subdivision (a)(13).

DISCUSSION

1. *No merit to contention that trial court lacked jurisdiction to allow the filing of the cross-complaint during the pendency of the appeal in* Rosas I.

As indicated, on April 12, 2016, during the pendency of the appeal in *Rosas I*, the trial court granted Kensington's and Mooney's request for leave to file a cross-complaint arising out of opposing counsel's failure to return the seized funds, and the cross-complaint was deemed filed as of that date.

The Attorney Cross-defendants now contend the trial court lacked subject matter jurisdiction to allow the filing of the cross-complaint because the trial court was divested of jurisdiction during the pendency of *Rosas I*, and therefore the order denying their anti-SLAPP motion is "void" and must be reversed. The Attorney Cross-defendants rely on the principle that the "filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur. [Citations.]" (*People v. Perez* (1979) 23 Cal.3d 545, 554; accord, *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196–198.) The Attorney Cross-defendants' jurisdictional argument is meritless.

First, as stated in *People v. Perez*, *supra*, 23 Cal.3d at page 554, only a *valid* notice of appeal divests the trial court of jurisdiction. Conversely, "[a]n appeal from a nonappealable order does not divest the trial court of jurisdiction. [Citations.]" (*Holloway v. Quetel* (2015) 242 Cal.App.4th 1425, 1431, fn. 6.) As set forth *ante*, this court held in *Rosas I* that because Rosas's and Casas's notice of appeal improperly specified the nonappealable February 9, 2016 order denying reconsideration, rather than the underlying order vacating the default judgments, Rosas and

Casas had failed to perfect an appeal from the order granting the motion to vacate. This court further held that Rosas and Casas lacked standing to appeal the March 2, 2016 order directing their counsel to return seized funds to Kensington and Mooney. Because Rosas and Casas had failed to bring a proper appeal, the pendency of *Rosas I* did not divest the trial court of jurisdiction.

Additionally, attorneys Iwuchuku and Ogike were not parties to Rosas's and Casas's appeal in *Rosas I*. Therefore, the pendency of *Rosas I* did not divest the trial court of jurisdiction to allow the filing of the cross-complaint against Iwuchuku and Ogike.[3]

We now turn to the merits of the special motion to strike.

---

[3] Iwuchuku and Ogike also contend the trial court lacked jurisdiction over the cross-complaint because they were not properly served with it. The argument is meritless because Iwuchuku and Ogike conceded jurisdiction by moving to specially strike the cross-complaint. (§ 1014.)

The opening brief also contends that Kensington and Mooney deprived Iwuchuku and Ogike of due process of law by failing to properly serve them with a copy of Kensington's and Mooney's reply papers on the motion for return of property. This argument appears to be unrelated to the order denying the special motion to strike, which is the subject of this appeal, and therefore requires no discussion.

2. *Trial court properly found the cross-complaint against Iwuchuku and Ogike did not arise out of protected petitioning activity by them.*

a. *General principles.*

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

We review an order granting or denying an anti-SLAPP motion under the de novo standard and, in so doing, conduct the same two-step process to determine whether, as a matter of law, the defendant met its initial burden of showing the challenged claim arose out of the defendant's protected activity and, if so, whether the plaintiff met its burden of showing a probability of success. (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 112–113.)

b. *Relevant allegations of the cross-complaint.*

The cross-complaint, which named Iwuchuku and Ogike, along with Rosas, Casas and McMullen, alleged the following causes of action: (1) conversion; and (2) a common count for money had and received/unjust enrichment.

Both causes of action alleged: In March 2015, Rosas and Casas each obtained a default judgment against Kensington and Mooney in the amount of $250,585. Based on these default judgments, the cross-defendants obtained a writ of execution and levied upon bank accounts held by Kensington and Mooney, from which they seized the sum of $293,896. On November 24, 2015,

the default judgments were set aside and the writ of execution was recalled. McMullen, the assignee of Rosas and Casas, had returned a portion of the funds, but the sum of $259,209 still had not been returned. On March 2, 2016, Kensington and Mooney obtained a court order directing Iwuchuku and Ogike, as well as Rosas, Casas and McMullen, to return the balance of the funds. Each cross-defendant was alleged to have wrongfully withheld funds belonging to Kensington and Mooney. However, the cross-defendants had failed to comply with the court's order.

c. *Trial court properly found the cross-complaint against Iwuchuku and Ogike did not arise out of their protected activity.*

Conversion is the wrongful exercise of dominion over the property of another. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240 [counsel may be held liable for conversion for refusal to return unearned fees advanced by client].) The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. (*Ibid*.)

The elements of a "claim of unjust enrichment are 'receipt of a benefit and unjust retention of the benefit at the expense of another.' [Citation.] 'The theory of unjust enrichment requires one who acquires a benefit which may not justly be retained, to return either the thing or its equivalent to the aggrieved party so as not to be unjustly enriched.' [Citation.]" (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1132.)

Although Iwuchuku and Ogike contend that both of these causes of action arose out of their protected activity in representing Rosas and Casas in litigation, a distinction is drawn "between activities that form the basis for a claim and those that

merely lead to the liability-creating activity or provide evidentiary support for the claim." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1064.) Assertions that are " 'merely incidental' or 'collateral' are not subject to section 425.16. [Citations.] Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 394 (*Baral*).) Only "allegations of protected activity that are asserted as grounds for relief" are properly subject to a special motion to strike. (*Id*. at p. 395, italics omitted.)

Here, the allegations of protected activity, i.e., that Iwuchuku and Ogike represented Rosas and Casas in litigation, merely provide context, without serving as the basis for the claims pled in the cross-complaint. The activity that formed the basis for the claims of conversion and unjust enrichment was the alleged failure by Iwuchuku and Ogike to restore the seized funds to Kensington and Mooney *after* the default judgments were vacated *and after* the trial court ordered return of the funds.

Thus, merely because the cross-complaint mentioned that Iwuchuku and Ogike had represented Rosas and Casas does not mean the claims pled in the cross-complaint arose from protected litigation activity by counsel. The allegation that the Attorney Cross-defendants had represented Rosas and Casas simply supplied context, without serving as the basis of the claims for conversion and unjust enrichment. (*Baral*, *supra*, 1 Cal.5th at p. 394.) Consequently, the cross-complaint did not arise from protected activity by Iwuchuku and Ogike. Therefore, the denial of their special motion to strike was proper.

In view of the above, we do not reach prong two of the anti-SLAPP analysis, or any other issues.

DISPOSITION

The order denying the Attorney Cross-defendants' special motion to strike is affirmed. Kensington and Mooney shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.